(2)

No. 99-1477

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SHERRY HEARN,

Petitioner,

v.

THE BOARD OF PUBLIC EDUCATION FOR THE CITY OF SAVANNAH AND THE COUNTY OF CHATHAM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner's Fourth Amendment Rights were violated by a drug-dog sniff of automobiles parked on school property?

2. Whether Petitioner's Fourth Amendment Rights were violated by a warrantless search of her parked automobile after a drug-dog "alerted" on her automobile.

3. Whether the discharge of Petitioner for insubordination for failing to submit to a drug test properly requested under the school board's Drug-Free Workplace policy violated Petitioner's Fourth Amendment Rights.

4. Whether Respondent's "Drug-Free Workplace" Policy, which is limited to reasonable-suspicion testing in accordance with the mandate supplied by the decisions in *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 109 S. Ct. 1402 (1989), and *Treasury Employees v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384 (1989), as well as *Chandler v. Miller*, 520 U.S. 305, 117 S. Ct. 1295 (1997) is, nevertheless, somehow constitutionally defective.

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STATEMENT OF THE CASE

A. The Course Of Proceedings

Respondent agrees with the summary of the prior proceeding set forth by Petitioner.

B. Statement Of Facts

The material facts necessary for an adjudication of this matter are undisputed. These facts are as follows:

Petitioner was a teacher at Windsor Forest High School. [R2-13-1]. Under the contract of employment, applicable to all teachers in the school district, Petitioner agreed to abide by the policies of the Board and the procedures developed by the administration. [R2-13-6-8 (Tab A)]. Petitioner was aware of the drug policy at issue in this case when she signed her contract and when asked to take the test. [R2-13-26 (Tab C-Transcript p. 370)].

On April 4, 1996, Chatham County law enforcement personnel and Board campus police conducted a sweep of cars parked in the parking lots of Windsor Forest High School utilizing trained drug-dogs. [R2-13-2]. Similar sweeps had occurred that school year and in previous years. [R2-13-26 (Tab C-Transcript pp. 36, 348-90].

During the sweep, the drug-dog being handled by a Chatham County Deputy Sheriff alerted at a vehicle owned by Petitioner. [R2-13-2]. Therefore, the drug-dog entered the car and alerted on the ashtray. [R2-13-2, 26 (Tab C-Hearing Ex. BOE-6)]. A search of the ashtray found a partially smoked, hand-rolled roach that field-tested positive for

marijuana. [R2-13-2]. Petitioner thereafter was asked to take a urinalysis drug test within the next two hours [R2-13-2], as set forth in the Board's drug policy. [R2-13-9 (Tab B)]. Petitioner refused to take the drug test as requested. [R2-13-2, 26 (Tab C-Transcript p. 402)].

The Superintendent suspended Petitioner and recommended her termination on the grounds of insubordination and for "other good and sufficient cause." [R2-13-2, 26 (Tab C-Hearing Ex. BOE-1)]. On April 30, 1996, following a full due process hearing, the Board upheld the recommendation that Petitioner's employment with the school system be terminated. [R2-13-2]. On November 14, 1996 the State Board of Education affirmed the Board's decision to terminate Petitioner. [R2-13-3]. In that decision, the State Board found:

> Petitioner knew what the principal was asking and consciously, with knowledge of the consequences, refused to obey a lawful request. The refusal to obey a lawful and reasonable request constitutes insubordination.

[R2-13-26 (Tab C-pp. 8, 11)].

Petitioner asserts additional alleged facts that are simply not material here. Moreover, Petitioner's contention that the facts set forth by Petitioner in her Petition "are those facts uncontroverted by the parties below and accepted as not at issue by the District Court . . ." is expressly controverted.

The facts upon which the District Court based its decision are reflected in the District Court's decision (Appendix "D" to Petition). The alleged facts presented by

Petitioner in support of her position in the trial court below were set forth in Plaintiff's Statement of Facts Pursuant to Local Rule 56.1 (R1-18). The specific facts that were uncontroverted by the Board are reflected in Defendant's Response to Plaintiff's Statement of Facts Pursuant to Local Rule 56.1 (R1-22).

Petitioner has chosen to focus on certain extraneous alleged facts intended to bolster the emotional appeal of her Petition. For example, petitioner cites the dissent in the Court of Appeals to suggest that the delay in taking any drug test until the next day was of no consequence. (Petition p. 13)[1] The test report ultimately obtained by Petitioner itself stated that it should not be used for legal or employment purposes. (Ex. D-3 T-363). Evidence that marijuana was found in her vehicle was admitted without exception at the personnel hearing prior to her termination, [R2-13-26 (Tab C-Transcript p. 178)], and Petitioner did not "challenge on any sort of 'fruit of the poisonous tree' analysis, the initial drug sweep by County law enforcement officers." (Appendix to Petition at D15).

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1. A false negative can be obtained by drinking large quantities of fluids prior to testing. A prompt test is important. *See* Edward J. Cone, *In Vivo Adulteration: Excess Fluid Ingestion Causes False Negative Marijuana and Cocaine Urine Test Results*, J. Analytical Toxicology, Vol. 22, No. 6, Oct. 1998, pp. 460-473.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI IS NOT APPROPRIATE IN THIS CASE, SINCE PETITIONER'S RIGHTS WERE NOT VIOLATED BY A DRUG-DOG SNIFF OF AUTOMOBILES PARKED ON SCHOOL PROPERTY AND THE ALERT BY THE TRAINED DRUG-DOG TO PETITIONER'S AUTOMOBILE RESULTED IN NOT ONLY INDIVIDUALIZED "REASONABLE SUSPENSION", BUT ALSO PROBABLE CAUSE, FOR THE REQUEST THAT PETITIONER TAKE A DRUG TEST.

This is not a case involving a *Terry* stop or a sniffing of an individual and there is no split in the circuits or uncertainty based on this court's precedent as to the propriety of the automobile sniff under the facts of this case.

Petitioner contends that the Board's use of a trained drug-dog to sniff cars parked in a school parking lot for drugs without individualized suspicion was a violation of Petitioner's Fourth Amendment rights. The U.S. Supreme Court, in *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637 (1983), addressing the issue of whether a dog sniff of luggage constituted a "search" within the meaning of the Fourth Amendment, stated:

> . . . the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore,

> we conclude that the particular course of investigation that the agents intended to pursue here — exposure of respondent's luggage, which was located in a public place, to a trained canine — did not constitute a "search" within the meaning of the Fourth Amendment.

Id., 462 U.S. at 707.

Following *Place*, the Supreme Court, in *United States v. Jacobsen*, 466 U.S. 109, 104 S. Ct. 1652 (1984), held that a police investigatory tool is not a "search" if it merely reveals the presence of absence of contraband because the privacy interest in possessing contraband is not one that society recognizes as reasonable. Justice Stevens writing for the Court observed:

> We must first determine whether [a cocaine field test] can be considered a "search" subject to the Fourth Amendment — did it infringe an expectation of privacy that society is prepared to consider reasonable?
>
> The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities . . .
>
> A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy . . . [E]ven if the [test] results are negative — merely

> disclosing that the substance is other than cocaine — such a result reveals nothing of special interest. Congress has decided — and there is no question about its power to do so — to treat the interest in "privately" possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably "private" fact, compromises no legitimate privacy interest.
>
> This conclusion is dictated by *United States v. Place*, in which the Court held that subjecting luggage to a "sniff test" by a trained narcotics detection dog was not a "search" within the meaning of the Fourth Amendment . . .
>
> Here, as in *Place*, the likelihood that official conduct of the kind disclosed by the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment.

Id., 466 U.S. at 122-124.

The *Place* and *Jacobsen* holdings make clear that action taken only to reveal the presence or absence of contraband, such as a drug-dog sniff, is not an intrusion of any legitimate privacy interest, and therefore not a "search" under the Fourth Amendment. *See United States v. Morales-Zamora*, 914 F.2d 200 (10th Cir. 1990); *see also Smith v. Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 2580 (1979).

Courts that have addressed the issue, including the Eleventh Circuit, and the District Court below, have correctly held that a drug-dog's sniffing of a car is not a search contemplated by the Fourth Amendment. *United States v. Holloman*, 113 F.3d 192 (11th Cir. 1997); *Merrett v. Moore*, 58 F.3d 1547, 1553 (11th Cir. 1995), *cert. denied*, 519 U.S. 816, 117 S. Ct. 58 (1996) (*stating* that: ". . . the external sniffing of plaintiff's vehicles was not a search within the meaning of the Fourth Amendment"); *Horton v. Goose Creek Ind. Schl. Dist.*, 690 F.2d 470, 477 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207, 103 S. Ct. 3536 (1983) (*holding* that the sniffs of lockers and cars on school property by trained dogs did not constitute a search); *United States v. Seals*, 987 F.2d 1102, 1106 (5th Cir. 1993), *cert. denied*, 510 U.S. 853, 114 S. Ct. 155 (1993) (*holding* that the sniff of a vehicle exterior was not a search); *United States v. Morales-Zamora*, 914 F.2d at 205 (10th Cir. 1990) (same); *United States v. Rodriguez-Morales*, 929 F.2d 780, 788 (1st Cir. 1991), *cert. denied*, 502 U.S. 1030, 112 S. Ct. 868 (1992) (same); *United States v. Jeffus*, 22 F.3d 554, 557 (4th Cir. 1994) (same); *United States v. Ludwig*, 10 F.3d 1523, 1527 (10th Cir. 1993), *aff'd*, 74 F.3d 1250 (10th Cir. 1995) (same).

Contrary to the Petitioner's argument, a dog-sniff, such as the one in this case, is not subject to significantly mixed precedent. First, this is not a case involving the sniffing of individuals. The Petitioner does not contend that her person was "sniffed." Petitioner's interjection of a student's observation describing the general search procedure does not transform this fact pattern into a bodily search. The holding in *B.C. v. Plumas Unified School Dist.*, 192 F.3d 1260 (9th Cir. 1999) is not applicable.

Second, this is not a *Terry* stop case. There is no seizure or detainment issue clouding the validity of the dog-sniff. The Petitioner's vehicle was parked in the school parking lot. The decision to perform a dog-sniff in this case was not used as a pretext for initially detaining the Petitioner and her vehicle. Therefore the issues discussed in *City of Indianapolis, et al. v. Edmond*, 183 F.3d 659 (7th Cir. 1999), *cert. granted*, No. 99-1030 (2000) are not applicable to this fact pattern.

Third, this case involves the dog-sniff of an automobile at a school, not the sniff of an apartment, hotel room or railcar roomette. Cases cited by Petitioner purport to demonstrate a struggle amongst the Circuit Courts involve the dog-sniffing of permanent and temporary residences. *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985) (case involving the dog-sniffing of the outside of an apartment); *United States v. Libero*, 660 F. Supp. 889 (1987) (case where aggressive drug-dog burst into a train passenger's roomette and hit on drugs in passenger's suitcase). Such cases do not demonstrate any controversy concerning the dog-sniff of an automobile parked in a public school parking lot. Petitioner in this matter is not entitled to any heightened expectation of privacy provided to the defendants in *Thomas* and *Libero*. Conversely, based on this Court's recent dicta in *Florida v. J.L.*, Case No. 98-1993, 2000 U.S. LEXIS 2345 (March 28, 2000), Petitioner's Fourth Amendment expectation of privacy was diminished due to her presence on school property.

There is no split in the circuits or uncertainty as to the applicable rules of law implicated by the material facts of this case. Appellant's Fourth Amendment rights were not violated by the drug-dog sniff of her automobile.

II.

CERTIORARI IS NOT APPROPRIATE WHERE RESPONDENT'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED BY A WARRANTLESS SEARCH OF HER AUTOMOBILE AFTER A DRUG-DOG ALERTED ON HER AUTOMOBILE AND ISSUES OF ADMISSIBILITY OF EVIDENCE WERE NOT ARGUED BELOW. *MARYLAND v. DYSON*, 527 U.S. 465, 119 S. Ct. 2013 (1999).

A. The warrantless search of Petitioner's automobile was lawful.

Petitioner contends that her Fourth Amendment rights were violated when police officers searched her car after the trained and experienced drug-dog "alerted" on it. Once the dog alerted police officers to Petitioner's automobile, probable cause existed to search her vehicle. Specifically, the courts have held that ". . . a drug dog alert without more [gives] probable cause for searches and seizures." *United States v. Ludwig*, 10 F.3d at 1527 (10th Cir. 1993), *aff'd*, 74 F.3d 1250 (10th Cir. 1995) (*citing United States v. Stone*, 866 F.2d 359, 364 (10th Cir. 1989)). *United States v. Jeffus*, 22 F.3d at 557 (4th Cir. 1994) (stating "when the dog 'alerted positive' for the presence of drugs, the officer was given probable cause for the search that followed"); *United States v. Chavira*, 9 F.3d 888, 890 (10th Cir. 1993) (stating "When the dog indicated the presence of narcotics, Robler had probable cause to conduct a search . . . which revealed the marijuana and cocaine"); *United States v. Hernandez*, 976 F.2d 929, 930 (5th Cir. 1992) (stating "Once the dog alerted, Arzate had probable cause to search the car . . .").

Police officers were not requested to obtain a search warrant before searching Petitioner's automobile. The "automobile exception" to the general rule that a search warrant must be secured before a search is undertaken is well-established. *California v. Carney*, 471 U.S. 386, 105 S. Ct. 2066 (1985); *United States v. Johns*, 469 U.S. 478, 105 S. Ct. 881 (1985); *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157 (1982); *South Dakota v. Opperman*, 428 U.S. 364, 96 S. Ct. 3092 (1976); *Cardwell v. Lewis*, 417 U.S. 583, 94 S. Ct. 2464 (1974); *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523 (1973); *Chambers v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975 (1970); *Cooper v. California*, 386 U.S. 58, 87 S. Ct. 788 (1967); *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280 (1925).

This Court has made it clear that the "automobile exception" has no separate exigency requirement. *Maryland v. Dyson*, 527 U.S. 465, 119 S. Ct. 2013 (1999); *Pennsylvania v. Cabron*, 518 U.S. 938, 116 S. Ct. 2485 (1996) (per curiam); *United States v. Ross*, 456 U.S. 798, 809, 102 S. Ct. 2157 (1982). Where there is probable cause to suspect contraband in an automobile, a warrantless search is proper. *See California v. Carney*, 471 U.S. 386, 105 S. Ct. 2066 (1985); *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157 (1982); *Michigan v. Thomas*, 458 U.S. 259, 261, 102 S. Ct. 3079, 3080-81 (1982); *Carroll v. United States*, 267 U.S. 132, 159, 45 S. Ct. 280, 287 (1925) (warrantless search proper where probable cause existed that automobile contained intoxicating liquor).

Petitioner asserts that the Board's policy to obtain consent before searching a teacher's vehicle raised her expectation of privacy such that a search, without consent or a warrant, was "unreasonable". The search arose out of a

school safety sweep, not one triggered by the Board's Drug Free Work place policy. The District Court observed, "after over twenty years of teaching [Appellant] knew or should have known that campus drug-sweeps were to be expected". [R1-24-19]. In fact, Petitioner testified that she was aware of previous drug-dog sniffs of the school parking lots. [R2-13-26 (Tab C-Transcript pp. 348-9)].

Further, the drug-dog "alert" which gave rise to probable cause to search Petitioner's vehicle took place in the presence and under the supervision of county police. [R1-24-18].

There is no "dangerous extension" of the automobile exception in this case. A warrantless search of an automobile in a public school parking lot it not unreasonable where there is probable cause, and the fact that the Board's policy called for consent did not change the fact that officers could lawfully search Petitioner's car without a warrant.

B. The admissibility of the evidence of marijuana found in the vehicle was unchallenged.

The District Court pointed out, Petitioner did *not* "challenge, on any sort of 'fruit of the poisonous tree' analysis, the initial drug sweep by *County* law enforcement officers. . . ." (Appendix to Petition at D15). In addition, the admissibility of the marijuana found in Petitioner's vehicle was never disputed at the initial due process hearing. [R2-13-26 (Tab C-Transcript p. 178)].

III.

CERTIORARI IS NOT APPROPRIATE SINCE NO FEDERAL RIGHT OF PETITIONER WAS VIOLATED BY THE BOARD'S DRUG TESTING POLICY OR THE BOARD'S REQUEST FOR HER TO SUBMIT TO A DRUG TEST UNDER THE CIRCUMSTANCES. MOREOVER PETITIONER'S TERMINATION FOR VIOLATION OF THE BOARD'S POLICY WAS LAWFUL UNDER STATE LAW.

The Board terminated Petitioner for her refusal to submit to a drug test and other good and sufficient cause. [R2-13-26 (Tab C-Transcript pp. 38, 49)]. Petitioner was aware of the fact that her contract of employment called for and required that she submit to such a test. [R2-13-26 (Tab C-Transcript pp. 115-116)]. Her principal begged her to take the test. She was given every benefit of the doubt and the campus police officer even waited extra time for her to appear. [R2-13-26 (Tab C-Transcript pp. 84-5)]. Further, she was aware that in the event that she did not submit to such a test, she could be discharged. She was so instructed. [R2-13-26 Tab C-Exhibit BOE-3)]. Petitioner has asserted that because the Board violated the Drug Policy by searching her automobile without consent, that the Board should not be allowed to discharge her for violation of the same policy. County police officers present during the drug-dog sniff were not bound by the policy, and therefore could search her vehicle as authorized by law. As the District Court pointed out, once the drug-dog alerted on Petitioner's automobile, the Board had the "reasonable suspicion" necessary to search Petitioner's vehicle under the Policy. [R2-13-19].

> At that point the Board was free, under the contract, to fire [Petitioner] for refusing to consent to the search of her car. [footnote] Because she had no choice, the fact that the county/campus police searched her car without her consent constitutes at most a technical contract violation, while the law requires on substantial compliance. [footnote] The sniff supported the search which turned up marijuana, thus reinforcing (with probable cause) the reasonable suspicion that the Board needed to demand the drug test. Upon [Petitioner's] refusal of that (i.e., the drug test) search, the Board was contractually authorized to terminate her. [cite]

[R2-13-19].

Insubordination is "just cause" for termination. *Employees' Retirement Sys. of Ga. v. Almgren*, 235 Ga. 368, 219 S.E.2d 749 (1975). *See also* O.C.G.A. § 47-2-2 (Michie 1986) (*stating* that a state employee may be discharged from employment for insubordination). The policy itself provides that the refusal to submit to a proper request to take a drug test is grounds for disciplinary action.[2] [R2-13-16 (Tab B-p. 9)]. As noted by the Board's superintendent:

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2. The Board's Drug Free Work Place procedure provides that:

> The employee immediately will be suspended, pending investigation and discipline, if he or she does not voluntarily and immediately accompany the designated employee to the testing site and submit to testing within two (2) hours of being requested to do so.

> . . . There is no member of the staff, that it be a student, teacher, an employee, that can be held above the policies of the Board of Education. And, as I mentioned, as a way of trying to help and assist our employees to make sure there aren't the problems that occur, those policies are enacted.
>
> To think that an employee would have the right to determine if she or he would be in a situation not to adhere to policy, I think would very badly damage the policies of the Board of Education and the opportunity to make sure that everybody in this district is treated fairly and equitably.

[R2-13-26 (Tab C-Transcript p. 38)]. Petitioner was properly discharged under state law because she would not submit to the drug-testing policy adopted by her employer.

IV.

CERTIORARI IS INAPPROPRIATE BECAUSE IT IS CLEAR THAT RESPONDENT'S "DRUG-FREE WORKPLACE" POLICY WAS CONSISTENT WITH THE GUIDELINES SET FORTH BY THIS COURT.

The requested drug test at issue in this case was not a random screen. The request for Petitioner to take the test was justified because a trained drug-dog alerted on Petitioner's vehicle on school property. Additional cause existed when marijuana was found in Petitioner's car. Possession of marijuana, and in particular, possession on school property, is a crime and direct violation of Board Policy.[3]

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3. O.C.G.A. §§ 16-13-30, 16-13-32.4; Board policy 0766 provides in part "The system prohibits the . . . presence (of drugs) on its property or work sites." [R1-1-14].

Significantly, Petitioner never took the required test and, therefore, should lack standing to challenge the mechanics of the testing procedure. *See Broderick v. Oklahoma*, 413 U.S. 601, 610, 93 S. Ct. 2908 (1973); *Logan v. Warren County Board of Education*, 549 F. Supp. 145, 149 (S.D. Ga. 1982). However, even if Petitioner had standing, her challenge is without basis.

The procedure at issue provides that a school-system employee must take a test when "supervisor observations or *other objective circumstances* reasonably support a suspicion that an employee may have alcohol and/or drugs present in his or her system or has otherwise violated the Board drug and alcohol policy." [R1-1-20]. The Board's limitation of its policy to reasonable-suspicion testing is in accord with the mandate supplied by the decisions in *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 109 S. Ct. 1402 (1989), and *Treasury Employees v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384 (1989), as well as by this Court's most recent pronouncement in *Chandler v. Miller*, 520 U.S. 305, 117 S. Ct. 1295 (1997). Significantly, the requested test at issue here was based not only on reasonable suspicion, but also on probable cause. [R1-24-17].

The present case does *not* involve a "special needs" search. It involves a drug test search based on individualized suspicion of criminal activity. Accordingly, no context-specific inquiry was or is necessary.[4]

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4. The Board notes, however, that if a showing of "special need" were at issue, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386 (1995) suggests that this additional standard would be met. Teachers become role models. Placing in the classroom a teacher who encourages drug use or engages in illegal activity will adversely impact children and their education.

The testing procedure described by the Board's policy is reasonably limited and was sufficiently private to further ameliorate any impact upon Fourth Amendment rights. [R1-1-23, 24].

This Court has noted that such procedural safeguards are important in alleviating the harsh effects of an alleged intrusion into privacy. *Skinner*, 489 U.S. at 626-627. The Court noted that the testing procedures in *Skinner* ". . . endeavor to reduce the intrusiveness of the collection process." *Id.* Among these protections was the fact that the policy did not ". . . require that samples be furnished under the direct observation of a monitor . . ." *Id.* The Court also noted that the samples were ". . . collected in a medical environment, by personnel unrelated to the railroad employer . . ." *Id.* Further, the procedure was ". . . not unlike similar procedures encountered in the context of a regular physical examination." *Id.*[5]

The Board's policy incorporates each of the safeguards articulated in *Skinner*. The Board, after all, does not collect the specimen, monitor the collection of the specimen, test the specimen, or require an employee to submit to a test that is outside the realm of an ordinary urine test. Thus, the testing procedures employed by the Board further support the Board's policy.

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5. The *Skinner* court even noted that ". . . the intrusion occasioned by a *blood test* is not significant, since such tests are commonplace in these days of periodic physical examinations . . ." (emphasis added). *Skinner*, 489 U.S. at 625.

CONCLUSION

Under Rule 10 of this Court, "review on a writ of certiorari is not a matter of right but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons."

There is no basis for review in this case. It is well settled that a dog-sniff of an automobile is not a search. *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637 (1983). Widely held precedent, unchallenged in this context, provides that a drug dog alert establishes probable cause for searches and seizures. *United States v. Ludwig*, 10 F.3d at 1527 (10th Cir. 1993), *aff'd*, 74 F.3d 1250 (10th Cir. 1995) (*citing United States v. Stone*, 866 F.2d 359, 364 (10th Cir. 1989)). Additional exigent circumstances are not required to perform a warrantless search of a vehicle. *Maryland v. Dyson*, 527 U.S. 465, 119 S. Ct. 2013 (1999). Petitioner's Fourth Amendment arguments were not preserved by objection to the alleged improperly discovered evidence. Finally, the termination of the Petitioner for refusing to comply the Board's reasonable drug testing policy was lawful. *Treasury Employees v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384 (1989).

The facts of this case do not present a need to resolve any conflict in the law and the decision conforms with the widely held precedents already promulgated by this Court. For this reason respondent respectfully requests that a writ of certiorari be denied.

Respectfully submitted,

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